Supreme Court, U.S.
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No. 01-1509

In The
Supreme Court of the United States

CHRISTY LYNETTE HOLLAND SEITZ,

Petitioner,

v.

WILLIAM SPEAGLE, and wife,
DERENE SPEAGLE,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of North Carolina

BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER PETITIONER'S CONDUCT, INCLUDING HER PARTICIPATION IN THE MURDER OF THE FATHER OF HER CHILD, ABROGATES HER CONSTITUTIONAL RIGHT TO CUSTODY OF HER CHILD.

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STATEMENT OF THE CASE

Amber Ashton Holland is the granddaughter of Respondents, William (Butch) and Derene Speagle. For the last six years, since January 30, 1996, Respondents have had custody of Amber. Even prior to that date Respondents were intimately involved in Amber's life. During these six years Amber and the Respondents have developed a strong mutual bond of love and affection.

Amber's biological parents are Petitioner, Christy (Holland) Seitz, and Respondent's deceased son William Stacy Speagle (Stacy). From the time Stacy and Petitioner met until his murder in January 1996, they had an "on again-off again" romantic relationship. In December of 1992, Petitioner discovered she was pregnant with Stacy's child. Amber was born on September 3, 1993. Around December of 1993 Petitioner and Stacy began experiencing relationship problems. Shortly thereafter Petitioner claimed Stacy was not Amber's father. A paternity test in March of 1994 proved Stacy was in fact the father. In the fall of 1994 Petitioner moved in the middle of the night to Raleigh, North Carolina without telling Stacy her new address. Approximately a week later, through their own efforts, the Respondents were able to locate Petitioner's new residence in Raleigh. While in Raleigh Petitioner started a career in exotic dancing by performing at a topless entertainment establishment called Pure Gold. Petitioner remained in Raleigh until approximately March of 1995 when she returned to Hickory, North Carolina. Upon returning to Hickory Petitioner continued her career as a topless dancer. In April or May of 1995 Petitioner danced at the Gentlemen's Club, a topless entertainment establishment in Charlotte, North Carolina. In June of 1995 Petitioner danced at the Triple A or PSST Club in

Hickory, a topless entertainment establishment. Petitioner was fired from her job at this establishment for ejaculating a patron on the premises. From June of 1995 until September of 1995 Petitioner danced at The Doll House, a topless entertainment establishment in Hickory.

When Petitioner would perform at these establishments she would often leave Amber in the care of one Roberta Jewell. Ms. Jewell has been cited on several occasions by the Catawba County Department of Social Services for child care related violations. On occasion, after Petitioner completed dancing for the night, she would awaken Amber at 3:00 a.m. and take her from Ms. Jewell's residence.

During 1995 Petitioner pursued a promiscuous lifestyle commensurate with her profession. She engaged in sexual relations with numerous men. Petitioner had sexual relations with Matt Moser. She had sexual relations with Phillip Christopher. Mr. Christopher was a patron at The Doll House when he first met Petitioner. Everette Hartsoe was another individual with whom Petitioner was having sexual relations during this time. Mr. Hartsoe was married at the time and a publisher of adult magazines. Mr. Hartsoe also "loaned" money to Petitioner, which was never repaid, during the course of their relationship. Petitioner also engaged in sexual intercourse with Bryce Delon during 1995.

Prior to July of 1995 the Respondents had regular contact with Amber and they cared for her frequently. In August of 1995 Petitioner and Stacy again had a falling out. At this time Petitioner stated she would not let Stacy see Amber any more. In September of 1995 Petitioner moved to Carolina Beach, North Carolina with Amber.

While living in Carolina Beach Petitioner began working at the Silver and Gold, another topless establishment, located near the Camp Lejeune Marine Corp Base.

While working at the Silver and Gold Petitioner met Bryce Delon, a marine stationed at Camp Lejeune. Petitioner began a relationship with Bryce Delon which included sexual intercourse. On occasion Petitioner would spend the night in the Marine Corp Barracks at Camp Lejeune with Bryce Delon. Bryce Delon also visited Petitioner in Hickory several times. In December of 1995 Petitioner even accompanied Bryce Delon to Dallas, Texas where she met his parents and performed at a topless establishment.

In response to Petitioner's taking Amber to Carolina Beach, Stacy filed a complaint seeking custody of Amber and a special proceeding to legitimate Amber. A Temporary Custody Order was entered in October of 1995 providing joint custody of Amber to Stacy and Petitioner. The custody case was set as the first case for trial on February 21, 1996. Upon the entry of this Order Petitioner moved back to Hickory.

In November of 1995, while living in Hickory, Petitioner accompanied a friend to the movies in Morganton. While on the way to the movies Petitioner stated "she was going to have Stacy killed before Christmas, that way she would have her [Amber] on Christmas. She said she had already talked with someone about it so as to whoever was going to do it, that no evidence would lead back to her as being the one that caused it."

In January of 1996 Petitioner and Stacy purportedly reconciled and Stacy moved in with her on January 18. Despite the purported reconciliation Petitioner

entertained Bryce Delon in her and Stacy's residence on January 27, 1996, while Stacy was at work. On that occasion Bryce Delon had a .45 caliber pistol with him. Also on that occasion a friend of Petitioner, Heather Brown stopped by unannounced. Heather Brown's unexpected appearance surprised Bryce Delon and he stated that Ms. Brown had "better be glad [she] was not Stacy or he would have popped a cap in [her] ass." Petitioner admitted she was aware of this statement. Two days later, on January 29, 1996, Bryce Delon did in fact murder Stacy Speagle with a .45 caliber pistol. Mr. Delon fled the scene in a Saab automobile owned by Petitioner's sister Brandie. Shortly, thereafter, Mr. Delon committed suicide as law enforcement attempted to apprehend him.

On January 30, 1996, Petitioner was arrested for conspiring to commit the murder of Stacy Speagle. On this same day the Respondents filed a complaint seeking custody of Amber. An Emergency Order was entered awarding custody of Amber to the Respondents. After Petitioner was bailed out of jail a Temporary Order was entered continuing custody of Amber with the Respondents until the criminal trial was completed.

Petitioner was bailed out of jail by her current husband Eric Seitz. Mr. Seitz paid between $30,000 and $85,000 to bail Petitioner out of jail. Prior to paying this large sum of money to obtain Petitioner's release Mr. Seitz had never met Petitioner. Mr. Seitz became aware of Petitioner's situation through his relationship with her sister, Brandie. Mr. Seitz met Brandie at a strip club in Dallas, Texas where he resides. After Petitioner was bailed out of jail she moved to Dallas and began working for Mr. Seitz. Thereafter they began a dating relationship which led to their marriage in 1997.

Eric Seitz's former fiancé testified that he had a sex addiction for which he sought professional treatment. She also testified that Mr. Seitz spent between $1,200.00 and $5,000.00 per month at adult entertainment establishments.

In June of 1997 Petitioner was tried and acquitted of the murder of Stacy Speagle. Following her acquittal a second Temporary Order was entered providing Petitioner visitation with Amber. A full custody trial began on August 11, 1998 and concluded on September 4, 1998. Evidence presented at the custody trial demonstrated that during the 20 months in which Petitioner awaited trial for the murder of Stacy Speagle, the Respondents and Amber developed a significant bond between them. Dr. Powell, a psychologist who worked with Amber, clearly recognized the strong bond existing between the Respondents and Amber. He also recognized that the Respondents were the psychological parents of Amber. Dr. Powell went on to testify that removing Amber from the Respondents' custody would be devastating to Amber. He also testified that in his professional opinion the best interest of Amber would be served by continuing her custody with the Respondents.

Numerous other people testified to the ability of the Respondents to properly care for and raise Amber. John Rousso, Mary Wendt, Kim Miller, Suzanne Osborne, Timothy Osborne, Karen Howell and Don Wendt all knew the Respondents personally and testified that the Respondents would be good custodians of Amber. Derene Speagle, also testified that she and her husband are able to provide a suitable, stable home for Amber, that they love her, and that Amber's best interest would be served by awarding them custody.

At the trial limited evidence was also admitted by the Court which suggested Petitioner's involvement in the murder of Stacy Speagle. The Trial Court, however, refused to admit other substantial pieces of relevant evidence which would have clearly implicated Petitioner in the murder. On appeal the Respondents advanced cross assignments of error with respect to this refusal to admit additional relevant evidence. At the conclusion of the custody trial the Trial Court found the Petitioner unfit to have custody of Amber and determined that the best interest of Amber would be served by awarding custody to the Respondents. The Petitioner was awarded significant visitation with Amber.

On April 14, 1999, the Petitioner appealed the Trial Court's decision to the North Carolina Court of Appeals. On December 29, 2000 the Court of Appeals reversed the Trial Court and awarded custody of Amber to Petitioner. In essence the Court of Appeals stated there was not sufficient evidence to find the Petitioner unfit and, therefore, the trial court erred in determining custody based on the best interest of Amber. Respondents sought and obtained review in the North Carolina Supreme Court. On December 18, 2001, in a unanimous decision, the North Carolina Supreme Court reversed the Court of Appeals and reinstated the Trial Court's judgment.[1]

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[1] Justice Edmunds did not participate in the consideration or decision of this case.

REASONS FOR DENYING THE PETITION

PETITIONER'S CONDUCT, INCLUDING HER PARTICIPATION IN THE MURDER OF THE FATHER OF HER CHILD, ABROGATES HER CONSTITUTIONAL RIGHT TO CUSTODY OF HER CHILD

Petitioner's contention that the decision below is wholly at odds with the consistent jurisprudence of this Court is entirely unfounded. To the contrary, the analysis employed by the North Carolina Supreme Court in affirming the award of custody to the Respondents carefully follows the applicable constitutional mandates established by this Court. On many occasions this Court has recognized that natural parents have a constitutionally protected liberty interest in the care, custody and control of their children. *Quilloin v. Walcott*, 454 U.S. 246, 255 (1978); *Troxel v. Granville*, 530 U.S. 57, 65 (2000). This constitutionally protected interest, however, does not exist by virtue of a mere biological link between the parent and child. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983). Rather, it exists coupled with the high duty, to recognize and prepare [the child] for additional obligations, and with the presumption that the parent will act in the best interest of their child. *Id.* at 258; *Parham v. J.R.*, 442 U.S. 584, 602 (1979). For a parent to receive full constitutional protection of their liberty interest in the care, custody, and control of their child, the parent must accept some measure of responsibility for the child's future and act in a manner consistent with the child's best interest. *Lehr,* 463 U.S. at 262; *Troxel,* 530 U.S. at 68-69. Where this Court has failed to extend constitutional protection to a natural parent, the natural parent's actions demonstrated a failure to assume or perform the requisite duties and obligations inherent in child rearing. *Michael H. v. Gerald*

D., 491 U.S. 110 (1989); *Quilloin v. Walcott*, 454 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983). Accordingly, the extent to which a natural parent is entitled to a constitutionally protected liberty interest in the care, custody, and control of their child requires an examination of the actions the parent has taken with regard to their child.

These very considerations were taken into account by the North Carolina Supreme Court when it promulgated the test employed in the decision below. In *Price v. Howard,* the North Carolina Supreme Court conducted a thorough due process analysis, employing applicable decisions of this Court, prior to unanimously establishing the following test for custody disputes between natural parents and third parties:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. [. . .] Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. If a natural parent's conduct has not been inconsistent with his or her constitutionally protected status, application of the "best interest of the child" standard in a custody dispute with a nonparent would offend the Due Process Clause. [. . .] **However, conduct inconsistent with the parent's protected status, which need not rise to the statutory level warranting termination of parental rights [. . .] would**

> **result in application of the "best interest of the child" test without offending the Due Process Clause. Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents.** Where such conduct is properly found by the trier of fact, based on evidence in the record, custody should be determined by the "best interest of the child" test mandated by statute. (emphasis added) (citations omitted). *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534-35 (1997).

This test mandates proper consideration for, and protection of, a natural parent's constitutional right to custody of their child. Only upon finding that the natural parent has abrogated their constitutional right by engaging in conduct inconsistent with their protected status as parent may a Court employ the best interest of the child test in determining custody. *Cantrell v. Wishon*, 141 N.C. App. 380, 540 S.E.2d 804 (2000); *Penland v. Harris*, 135 N.C. App. 359, 520 S.E.2d 105 (1999). Absent such a finding the natural parent's constitutional right to custody prevails.

In the present case the North Carolina Supreme Court determined that Petitioner, by her own conduct, abrogated her constitutional right to custody before it sanctioned the use of the "best interest of the child" test. *Speagle v. Seitz*, 354 N.C. 525, 534, 557 S.E.2d 83, 88 (2001). This approach is entirely consistent with the jurisprudence of this Court and with that of numerous other States. *Doe v. Chambers*, 374 S.E.2d 758 (Georgia

1988); *Greathouse v. Shereve*, 891 S.W.2d 387 (Kentucky 1995); *Simmons v. Comer*, 438 S.E.2d 530 (West Virginia 1993). Petitioner's constitutional right to custody of Amber was abrogated, not by the lower Court's failure to afford it to her, but by her own actions. Because Petitioner's constitutional rights were adequately considered and protected by the Supreme Court of North Carolina, certiorari is not appropriate.

A. Petitioner Abrogated Her Constitutional Right to Custody of Amber by Conduct Inconsistent With Her Protected Status as Amber's Parent, Namely Her Participation in the Murder of Amber's Father.

Petitioner contends that her due process rights to custody of Amber were denied when the lower court employed a "best interest of the child test" in awarding custody of Amber to the Respondents. As support for this contention Petitioner relies on this Court's decision in *Troxel* where this Court affirmed the reversal of an order granting grandparents visitation with their grandchild which exceeded that offered by the child's mother. *Troxel,* 530 U.S. at 66. Petitioner's reliance on this case, however, is misplaced. Unlike the present case, the fitness of the mother in *Troxel* was never at issue; a point specifically noted by this Court in its decision. *Id.* at 68. *Troxel* supports only the proposition that a State may not interfere with the decisions of a fit parent without giving special weight to the parent's determination as to what is in their child's best interest. *Id.* at 69. In the present case the Petitioner's fitness is squarely at issue.

The evidence adduced at trial, and reviewed by the Supreme Court of North Carolina, demonstrates that the Petitioner engaged in conduct patently inconsistent with her protected status as a parent, namely, participation in the murder of Amber's father, Stacy Speagle. The mere fact the Petitioner was acquitted of the criminal charges brought against her does not mean she did not in fact participate in the murder of Stacy Speagle. Her acquittal simply means the State did not convince, beyond a reasonable doubt, a jury as to her involvement.

While the trial court improperly limited the introduction of evidence demonstrating Petitioner's involvement in the murder of Stacy Speagle, compelling evidence was admitted that shows Petitioner's complicity in the murder. The trial court specifically found that the Petitioner stated to Heather Brown that "Stacy Speagle would be dead by Christmas and it was taken care of." (Petition for Writ of Certiorari, App. 28, N. 32). The only inaccuracy in this statement is that it was approximately a month after Christmas when Stacy Speagle was killed. The individual who killed Stacy was Petitioner's paramour, Bryce Delon. In December of 1995 the Petitioner traveled with Mr. Delon to Texas to meet his family. On January 18, 1996, the Petitioner and Stacy Speagle purportedly reconciled and he moved in with Petitioner. Twelve days later Stacy Speagle was murdered by Mr. Delon.

In the time between the Petitioner's reconciliation with Stacy Speagle and his murder, Petitioner entertained Mr. Delon in her residence. Heather Brown testified that she encountered Bryce Delon at the Petitioner's residence on this occasion. Ms. Brown further testified that Bryce Delon had a .45 caliber pistol with him and he said to her when she arrived at the residence unannounced, "better be

glad I wasn't Stacy or he would have popped a cap in my ass." This statement was related to Petitioner who responded "Well, yeah, right." None of this evidence has been objected to on appeal. Ms. Brown even testified that Petitioner stated, in discussing the future killing of Stacy, that "she had already talked with someone about it so as to whoever was going to do it, that no evidence would lead back to her as being the one that caused it." This evidence alone is sufficient to show Petitioner's involvement in the murder. Taken together with the admissible evidence excluded by the trial court, it clearly indicates that Petitioner participated in the murder and exercised a guiding hand in its perpetration.

The additional evidence excluded by the Trial Court, which the Supreme Court of North Carolina found to be relevant, further demonstrated Petitioner's involvement in Stacy's murder. The excluded evidence consists, in part, of a verbatim transcript of testimony given by Robert Varney in the criminal trial of Petitioner for the murder of Stacy Speagle. This transcript provides details that link Petitioner's active participation to the murder of Stacy Speagle. For instance, Mr. Varney testified, among other things, that two days prior to Stacy Speagle's murder Bryce Delon (the gun man) told him while traveling to Hickory to see the Petitioner that "he (Delon) was going to have Christy (Petitioner) send him (Stacy Speagle) to a Food Lion and he was going to pop him in the parking lot." Bryce Delon in fact murdered Stacy Speagle in a Food Lion parking lot where Stacy Speagle stopped, on his way home from work, to obtain food items requested by Petitioner.

Mr. Varney also testified that when he and Bryce Delon arrived at the Petitioner's residence on January 27,

1996, two days prior to the murder, the Petitioner and Bryce Delon engaged in a lengthy private conversation. Bryce Delon also had a .45 caliber pistol with him on that occasion. Stacy Speagle was murdered with a .45 caliber pistol. At one point during the evening a woman named Heather Brown came to the residence, knocked on the door and startled Mr. Delon. Mr. Delon hid in the residence bathroom with the pistol until he ascertained who had come to the residence. During this time period Bryce Delon was very excited or panicky. Mr. Delon stated to Ms. Brown, that "You almost got f – – ing shot." These actions all occurred while Amber was in the residence.

This evidence points unerringly to the conclusion that the Petitioner was not only aware of the plan to murder Stacy Speagle but also participated in it. There is no evidence more relevant to the determination of a parent's fitness for custody than that which indicates the parent was involved in the murder of the child's other parent. *Simpson v. Brown*, 67 Cal. App. 4th 914, 925-26, 79 Cal. Rptr. 2d 389, 395 (1998).

Assuming for the sake of argument, that the evidence presented did not prove Petitioner's active participation in the planning of the murder, it does show Petitioner to have an unusually close connection to the incident. This connection is not unlike that present in the case of *In Re Smith's Guardianship*, 147 Cal. App. 2d 686, 306 P.2d 86 (1956). In that case a mother sought custody of her child over the child's paternal aunt. Prior to the custody action the mother's paramour murdered, and was convicted of murdering, the child's father, who was at the time married to the child's mother. The mother, like the present Petitioner, was indicted, tried and acquitted of the father's murder. Thereafter, she sought to gain custody of her

child. The trial court properly considered all the evidence of the murder and denied the mother custody. In affirming the trial court the appellate court stated:

> The trial judge was entitled to believe from the evidence in the murder case that, although appellant did not participate in planning the murder, she knew of Wolf's plans and took no steps to protect her husband. The trial judge was also entitled to believe that appellant was involved with the murderer, and that this relationship was the inspiration for the murder. Under such circumstances, to place Susan back into the custody of appellant, would be to subject her to most unpleasant possibilities. The child would always have some doubt about the moral responsibility of her mother for the death of her father. This would certainly not be in the best interest of the child. *In Re Smith's Guardianship*, 147 Cal. App. 2d at 703, 306 P.2d at 98.

In the present case it is undisputed that the Petitioner knew her paramour made statements about killing Stacy Speagle two days prior to doing so. She also knew he had the means to carry out his threat. The Petitioner, however, took no steps whatsoever to protect Stacy Speagle. It is also undisputed that the Petitioner had a relationship with Stacy Speagle's killer and that the relationship was the inspiration for the murder. Under these circumstances to place Amber back into the custody of Petitioner would be to subject her to most unpleasant possibilities. Amber would always have some doubt about the moral responsibility of her mother for the death of her father. This would certainly not be in the best interest of Amber.

Of the actions identified by the North Carolina Supreme Court as being inconsistent with a parent's

protected status (unfitness, neglect, and abandonment) none compare in severity to the action of procuring the murder of a child's parent. Petitioner's actions in procuring the murder of Stacy Speagle, whether purposefully as Respondents contend or by association, deprive Amber of a precious asset that can never be replaced. Amber will never know her father. She will never know his love, his affection, his guidance, his kindly offices, or his counsel. Taking something of such incomparable value from a child must be deemed an action contrary to the presumption that a parent will act in the best interest of their child. It must be deemed an action inconsistent with Petitioner's protected status as a parent, thereby abrogating her constitutional protection. Application of the best interest of the child analysis is constitutionally appropriate in the present action as Petitioner, unlike the mother in *Troxel*, is unfit.

B. The Lower Court's Use of a Preponderance of the Evidence Standard Adequately Protects Petitioner's Constitutional Right to Custody of Her Child.

Petitioner contends that the lower court's use of the preponderance of the evidence standard in a custody action runs contrary to this Court's holding in *Santosky v. Kramer*, 455 U.S. 745 (1982). In *Santosky*, however, this Court only addressed the standard of proof required to terminate parental rights. *Id.* at 747-748. In determining that clear and convincing evidence was necessary to terminate parental rights, this Court balanced the "three distinct factors" specified in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), 1.) the private interest affected by the proceeding; 2.) the risk of error created by the State's

chosen procedure; and 3.) the countervailing governmental interest supporting use of the challenged procedure. *Santosky*, 455 U.S. at 754. The factors warranting a clear and convincing standard of proof in *Santosky* do not support such a standard in custody disputes. First, with respect to the private interest affected by the proceeding, this Court noted that in a termination of parental rights case the State seeks not to merely infringe a parents fundamental liberty interest but to terminate it permanently. *Id.* at 759. This Court found the decision to permanently terminate a constitutional right to be a commanding one which supported the employment of a standard of proof more stringent than a mere preponderance. *Id.* at 759. In a custody action the parent's fundamental right is not terminated but merely infringed. In fact, Petitioner was awarded significant visitation with Amber. Furthermore, North Carolina provides mechanisms for modifying custody orders. N.C. Gen. Stat. 50-13.7. As the fundamental right at issue in the present action is not terminated but merely limited, the first *Mathews* factor does not support the need for the more stringent standard required in a termination proceeding.

Second, with respect to the risk of error created by the chosen procedure, this Court recognized in *Santosky* that parents will have to face the full weight of the State's resources in opposing the termination. *Santosky,* 455 U.S. at 763-764. This disparity in resources coupled with a "fair preponderance of the evidence" standard created a prospect of erroneous termination warranting the more stringent standard of proof. *Id.* at 764. In the present action the parties are private citizens who meet on equal footing with equal resources. Because of the lower risk of erroneous decisions in custody cases, the second *Mathews*

factor also does not support the need for the more stringent standard required in a termination proceeding.

With respect to the third *Mathews*' factor, the state's interest in a custody proceeding, like its interest in a termination proceeding, is the welfare of the child. This interest, however, is sufficiently protected by the test employed in this action. The North Carolina Supreme Court did not simply apply a preponderance of the evidence standard to a best interest of the child analysis. Reading the Court's opinion in context indicates that a non-parent, third party may show, by a preponderance of the evidence, that it would be in the child's best interest for custody to reside other than with the parent, only after the parent is found to have lost their constitutionally protected status. Requiring a third party to first overcoming the presumption of parental fitness provides sufficient additional protection to adequately safeguard their constitutional rights. As all the *Mathews*' factors warranting use of the standard adopted in *Santosky* are not present in custody actions, application of the clear and convincing standard is not necessary.

C. The Evidence Presented at Trial Demonstrated Petitioner Was Unfit to Have Custody of Amber.

As has been previously discussed, the evidence produced at the trial of this action demonstrated Petitioner's involvement in the murder of Amber's father, Stacy. Such evidence alone is sufficient to qualify Petitioner as unfit. The North Carolina Supreme Court astutely noted that other areas of law do not permit one to benefit from procuring the death of another. *Speagle v. Seitz*, 354 N.C. 525, 532, 557 S.E.2d 83, 87 (2001). For

instance, N.C. Gen. Stat. 31A-4 prevents a murder from acquiring the testate or intestate property of a decedent he willfully and unlawfully killed. Likewise, a person may not share in wrongful death proceeds where his negligence caused the death. *Carver v. Carver*, 310 N.C. 669, 675, 314 S.E.2d 739, 744 (1984). It would be incongruous to allow Petitioner to benefit from procuring the death of Stacy in a custody action while barring her from benefitting in a property or estate matter. *Speagle*, 354 N.C. at 532, 557 S.E.2d at 87.

In addition to the evidence of Petitioner's participation in the murder of Stacy, there is additional evidence which demonstrates her parental unfitness. Evidence before the Trial Court demonstrates the Petitioner to be a woman of low character and morals with a sordid past. She performed regularly as an exotic dancer in topless entertainment establishments. She led a very promiscuous lifestyle. While performing as an exotic dancer Petitioner left Amber in the care of a woman who had been cited by the Catawba County Department of Social Services for child care related violations. She was even fired from a topless club for ejaculating a male patron on the premises. Assuming for the sake of argument that Petitioner had no active role in procuring the death of Stacy, her immersion into the lifestyle noted above led directly to Stacy's death. Her association with individuals such as Bryce Delon, and the lifestyle she chose, led directly to her arrest and trial. She was not the innocent victim of unfortunate circumstance. It is evident that a person incarcerated and awaiting trial for murder cannot care for a minor child. The Trial Court's finding that Petitioner's own conduct resulted in her neglect and separation from the minor child is well founded.

Without denying she engaged in the conduct described above, the Petitioner contends it was improper for the trial court to consider her past conduct when evaluating her fitness as a parent. The Court, however, qualified what past conduct could be considered. *Speagle,* 354 N.C. at 531-532, 557 S.E.2d at 87. Only that conduct which could impact either the present or future of the child is relevant, notwithstanding the fact that such circumstances or conduct did not exist or was not being engaged in at the time of the custody proceeding. *Id.* Courts are not endowed with the ability to foresee the future. The best predictor of future conduct is an analysis of past conduct. The North Carolina Supreme Court wisely recognized the folly of failing to consider prior actions of a parent where they may impact their child.

The Trial Court also considered, as it should in determining the award of Amber's custody, the Respondents' past and present conduct which proved markedly different from that of the Petitioner. The Supreme Court of North Carolina acknowledged that the evidence showed the Respondents to be of good character and reputation and to have a stable home. *Speagle*, 354 N.C. at 529, 557 S.E.2d at 85. It acknowledged that Amber is well adjusted and that there is a strong bond between Amber and Respondents. *Id.* Specifically, the trial court stated in Finding of Fact No. 57, "That the Court finds that since the birth of the child, through and including January 30, 1996, and continuing until the present, there has been a close and loving relationship between the Respondents and the minor child and that the continuation of this relationship is necessary to protect the best interest and welfare of the minor child." No like findings were identified by any lower court with respect to the Petitioner.

Because Petitioner abrogated her constitutional right to custody of Amber, the best interest of Amber would be served by allowing her to remain with the only family she has known and loved for the last six years.

CONCLUSION

For these reasons the Respondents respectfully request the Court to deny the Petition for Writ of Certiorari.

RESPECTFULLY submitted this the 15th day of May, 2002.

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